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In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD W. BABIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
DONALD B. SUSSWEIN
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Statement 2

Argument 4

Conclusion 11

CITATIONS

Cases:

California v. *Green*, 399 U.S. 149 6

Dutton v. *Evans*, 400 U.S. 74 ..... 5, 6, 7, 10

Hoover v. *Beto*, 467 F. 2d 516, cert. denied, 409 U.S. 1086 10

Ottomano v. *United States*, 468 F. 2d 269, cert. denied, 409 U.S. 1128 ..... 7, 10

United States v. *Johnson*, 575 F. 2d 1347, cert. denied, 440 U.S. 907 10

United States v. *Lekowitz*, No. 79-1328 (9th Cir. Jan. 31, 1980) 2

United States v. *Papia*, 560 F. 2d 827 ..... 7, 10

United States v. *Puco*, 476 F. 2d 1099, cert. denied, 414 U.S. 844 10

United States v. *Roberts*, 583 F. 2d 1173, cert. denied, 439 U.S. 1080 10

United States v. *Snow*, 521 F. 2d 730, cert. denied, 423 U.S. 1090 10

Page

Constitution, statutes and rule:

United States Constitution, Sixth Amendment 4, 5, 7

18 U.S.C. 371 2

18 U.S.C. 1001 2

26 U.S.C. 7201 2

26 U.S.C. 7203 2

26 U.S.C. 7206(1) 2

26 U.S.C. 7206(2) 2

Fed. R. Evid. 801(d)(2)(E) 5, 10

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OPINIONS BELOW

There is no opinion of the trial court. The memorandum opinion of the court of appeals (Pet. App. A-1 to A-5) is not reported; the affirmance of the conviction is reported at 614 F. 2d 777.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1980. The petition for a writ of certiorari was filed on February 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied his right of confrontation by the admission into evidence of the out-of-court statements of one of his co-conspirators.

STATEMENT

Petitioner was convicted on December 6, 1978, after a non-jury trial in the United States District Court for the Central District of California, of conspiring to defraud the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371, and of aiding and assisting in the presentation of fraudulent documents to the IRS, in violation of 26 U.S.C. 7206(2). The indictment on which petitioner was convicted charged that petitioner and one Albert M. Lefkowitz,[1] together with others, had conspired to prepare and present to the IRS false and fraudulent cash records for N/U Rent-A-Car, to conceal the existence and whereabouts of various business records that had been summoned by the IRS, and to cause the company's bookkeeper, Lloyd M. Fisher, an unindicted co-conspirator who actually prepared the false cash records, to leave the United States and travel to Canada in order to make his testimony unavailable to the IRS (C.T. 2-3).[2] The indictment also charged that petitioner aided and assisted in the preparation and presentation to the IRS of false and fraudulent cash receipts and cash disbursements journals for N/U Rent-A-Car.

Petitioner, an attorney and former IRS Special Agent, was given concurrent four-year terms of probation on each count, with the requirement that he spend six months in a jail-type institution, pay a fine of $2,500, and perform 200 hours of voluntary community service.

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[1]Lefkowitz was also convicted after a non-jury trial of violating 18 U.S.C. 371 and 1001, and 26 U.S.C. 7201, 7203, and 7206(1), and was sentenced to four years' imprisonment and three years' subsequent probation. The court of appeals affirmed in an opinion that is not yet reported. *United States* v. *Lefkowitz*, No. 79-1328 (9th Cir. Jan. 31, 1980).

[2]"C.T." references are to the Clerk's Transcript of Record.

The following facts were established by the evidence at petitioner's trial. Lefkowitz was president of N/U Rent-A-Car and petitioner was an attorney representing the corporation (R.T. 133-135).[3] On June 12, 1975, IRS agents went to the corporate office, told Lefkowitz that he and the corporation were under investigation for possible violations of the tax laws, and served a summons upon him calling for production on June 23, 1975, of the corporate records for 1971 through 1974 (R.T. 20-22). Thereafter, petitioner, Lefkowitz and Fisher met to discuss the IRS summons. Lefkowitz expressed concern that the 1973 records would show that large amounts of cash had been withdrawn from the business (R.T. 79). Fisher jokingly suggested burning the records and then, pursuant to the request of Lefkowitz, agreed to rewrite the books (R.T. 79-81). On June 23, petitioner, Lefkowitz and Fisher met with the IRS agents and represented that the summoned records did not exist or had been lost or destroyed (R.T. 23, 84-85). The date of July 14 was set for the production of whatever records could be found by then (R.T. 25). On that date, the agents were given the rewritten corporate books for 1973 (R.T. 25-26, 30, 86).

Prior to July 14, Fisher had expressed concern over the fact that many of the source documents for the original records sought by the IRS remained in the corporate office (R.T. 82-83). On June 28, 1975, Lefkowitz, Fisher, Patricia Sullivan (a secretary employed by the corporation and Lefkowitz's girlfriend), and two others moved numerous corporate records to Sullivan's apartment and Lefkowitz's home (R.T. 83-84). Subsequently, on November 17 and 18, 1975, the IRS

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[3]"R.T." references are to the Reporter's Transcript of Proceedings.

obtained these records through the execution of two search warrants (R.T. 32-33).

On November 20, 1975, Lefkowitz told Fisher that he had just talked with petitioner and that they thought it would be best for Fisher to leave the country for a period of time (R.T. 89). Fisher, using a car given to him by Lefkowitz, went to Vancouver, British Columbia, where he remained through the end of December 1975 (R.T. 89-92).

ARGUMENT

Petitioner contends (Pet. 6-14) that certain testimony of Patricia Sullivan relating out-of-court statements made to her by Lefkowitz violated petitioner's Sixth Amendment right of confrontation. There is no merit to this claim.

The trial court found that Sullivan joined the conspiracy on June 28, 1975, the day she testified she had helped Lefkowitz and Fisher move certain corporate records from the offices of N/U Rent-A-Car to various other locations, including Sullivan's apartment (R.T. 223, 138-139). Sullivan first testified to a conversation between Lefkowitz and herself at Sullivan's apartment on the morning the records were moved, stating (R.T. 139):

> He [Lefkowitz] told me prior to the time we went to the office that he had had a conversation with Mr. Babic [petitioner] early in the week and a discussion had come up about these records, and Mr. Babic [petitioner] was very upset that they still existed and wanted them destroyed. However, Mr. Lefkowitz feld [*sic*] he needed them to continue to conduct his business, therefore he was only going to move them, and we might as well get it done that day.

She then recounted a conversation between Lefkowitz and herself in mid-November of 1975, several days after the IRS had served and executed the search warrants to obtain records from the corporate offices and Lefkowitz's house; "He [Lefkowitz] told me that Mr. Babic [petitioner] had asked him who at this point could hurt him and he said only Mr. Fisher, and Mr. Babic [petitioner] then says, 'Get him out of town' " (R.T. 141).

Petitioner does not argue, nor could he, that this testimony was inadmissible hearsay evidence. The out-of-court declarations of Lefkowitz were properly admissible as the statements of a co-conspirator made during the course and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E). Rather, citing *Dutton* v. *Evans*, 400 U.S. 74 (1970), petitioner argues that the admission of Lefkowitz's statements to Sullivan violated petitioner's Sixth Amendment right to confront the witnesses against him because Lefkowitz did not take the stand and submit to cross-examination.

In *Dutton*, the Court considered the limitations imposed by the Confrontation Clause of the Sixth Amendment through the Fourteenth Amendment upon a state's evidentiary rule governing the admissibility of hearsay. The Court held that the admission of testimony in that case concerning an out-of-court declaration by someone who did not testify did not violate defendant Evans's right of confrontation. In a plurality opinion joined by three other members of the Court, Mr. Justice Stewart acknowledged (400 U.S. at 86) that "the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots" but declined to

equate the two.[4] In concluding that the Confrontation Clause was not violated by the admission of the testimony of one Shaw concerning a statement by one of Evans's alleged accomplices (Williams) that appeared to implicate Evans in the offense charged, Mr. Justice Stewart distinguished the case on various grounds from others in which Sixth Amendment violations had been found (400 U.S. at 87); and, observing that the "mission" of the Confrontation Clause was to assure that " 'the trier of fact [has] a satisfactory basis for evaluating the truth' " of the out-of-court statement (400 U.S. at 89, quoting *California* v. *Green*, 399 U.S. 149, 161 (1970)), he considered four "indicia of reliability" of the out-of-court statement at issue.[5] He concluded that the admission of the statement was constitutional despite the fact that the declarant did not appear at trial and submit to cross-examination.

Because this Court has never found a Confrontation Clause violation where disputed statements were admitted under the federal co-conspirator's exception, which is narrower than the exception concerned in *Dutton* (400

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[4]Mr. Justice Harlan, concurring in the result (400 U.S. at 93-100), was of the view that the Sixth Amendment placed no constraints on rules governing the admission of hearsay. Rather, he concluded that the Fifth Amendment due process guarantee was the applicable standard and that Evans's claim was properly rejected so long as adequate procedures were provided.

[5]Those indicia are (1) whether the statement contained no express assertion about past fact and thus would not be likely to be assigned great weight by a jury; (2) whether the out-of-court declarant would have personal knowledge of the offense involved and the participants; (3) whether circumstances indicated that the declarant was not relying on faulty recollection; and (4) whether the circumstances did not suggest that the declarant might have misrepresented matters (400 U.S. at 88-89).

U.S. at 81), it is arguable that the "reliability" tests need not be applied at all. See *United States* v. *Papia*, 560 F. 2d 827, 836 n.3 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F. 2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). Nonetheless the court below cited (Pet. App. A-4) the four "indicia of reliability" from the *Dutton* plurality opinion in concluding that the admission of Lefkowitz's statements through Sullivan's testimony did not violate the Sixth Amendment.[6] Petitioner does not directly challenge the court's application of the standard derived from the *Dutton* plurality opinion; rather he asserts (Pet. 6-9) that the standard is in need of "refinement" and that under the refined standard he would prevail on his Sixth Amendment claim. He also asserts (Pet. 9-12) that this Court should grant review to resolve a conflict among the circuits concerning the proper standard. These contentions are without merit.

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[6]Specifically the court of appeals observed (Pet. App. A-4):

> [T]he declarant was the organizer and "hub" of this "wheel-type" conspiracy, and knew better than anyone * * * [petitioner's] involvement therein; the declarations being of contemporaneous facts, do not suggest faulty recollection on the part of the declarant; and the circumstances under which the declarations were made do not provide any particular reason to doubt the declarant's veracity.

The fact that Lefkowitz was himself purporting to quote another declarant does not make this a more difficult case than *Dutton*, since the third declarant was petitioner himself. Petitioner was free to take the stand to deny or explain any of the statements attributed to him, and he did in fact do so, denying his involvement in or knowledge of the activities to which Lefkowitz's statements linked him (R.T. 236-287). Thus petitioner's assertion (Pet. 8) that this case involves "double hearsay" adds nothing to his claim.

Petitioner is vague about the refinement he is proposing, but he appears to suggest that the admission against a defendant of out-of-court statements by a nontestifying co-conspirator should always be held violative of the Confrontation Clause either where those statements are deemed "crucial" or "devastating" (Pet. 8) or where the reliability of the out-of-court statement is not proved by a preponderance of the evidence (Pet. 12-14).[7] Whatever the merits of petitioner's suggestions, this is not the case in which to consider them.

Direct evidence of petitioner's statements and activities, introduced through the testimony of Lloyd Fisher, the company bookkeeper who actually prepared the false records, established by more than a preponderance of the evidence the reliability of the statements concerning petitioner's role in the scheme that Sullivan attributed to Lefkowitz.[8] And by the same token, given Fisher's testimony, those statements quoted by Sullivan were

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[7]Although the heading for petitioner's argument on this point states that "The Standard for Determination of Reliability Must Be Greater Than Mere Preponderance of the Evidence" (Pet. 12), he does not, in fact, appear to argue for a higher standard.

[8]Petitioner's suggestion (Pet. 8) that Lefkowitz's statements should be deemed unreliable because he had a "motive for fabrication" (calming the fears of a co-conspirator by suggesting that the proposed scheme had the "sanction" of an attorney's approval) rests on a mischaracterization of Sullivan's testimony concerning those statements. The statements of Lefkowitz as reported by Sullivan would hardly serve to ease any trepidations about moving the records, for Lefkowitz represented that petitioner was "very upset" about the continuing existence of the records (R.T. 139). Similarly, Lefkowitz's report that Babic counselled getting Fisher out of town (R.T. 141) was not calculated to ease fears, since Lefkowitz explained that Fisher "could hurt" Lefkowitz.

clearly not "crucial" to the government's case, as petitioner contends. Fisher testified that he, Lefkowitz, and petitioner participated in a meeting at which Lefkowitz suggested that the records be rewritten (R.T. 78-80, 114-115). Fisher also testified that he met with petitioner on two occasions, attempted to discuss his progress on the rewriting of the records, and complained to petitioner about security problems, including the fact that the source documents from which the original records had been made were still in the corporate offices. Fisher testified that he asked petitioner to talk to Lefkowitz about the security problems (R.T. 81-83, 120). Fisher further testified that a few days after the false records were submitted to the IRS, petitioner asked him at lunch whether the records submitted to the IRS could create problems, and he replied that only the rewritten 1973 cash journals could be a problem (R.T. 87). Fisher testified that he met with petitioner after the IRS seized the original records which had been secreted and expressed his alarm that the IRS had both the original and rewritten books. According to Fisher's testimony, petitioner told him not to worry and that it would work out all right (R.T. 88-89). Then, Fisher testified, Lefkowitz told him on November 20, 1975, that petitioner and Lefkowitz thought it would be best if Fisher were to leave the country for a while (R.T. 89). Fisher subsequently left for Vancouver, British Columbia, with the assistance of Sullivan and Lefkowitz (R.T. 88-91).

In view of Fisher's testimony, Sullivan's testimony concerning Lefkowitz's remarks linking petitioner to the scheme can hardly be considered "crucial," as petitioner contends (Pet. 8). Nor, in view of the fact that this was a non-jury trial, can the admission of the testimony be

considered "devastating" to petitioner's defense. The trial judge was perfectly capable of assigning the hearsay testimony the weight it deserved.

Petitioner is correct in asserting that the circuits are divided as to the constitutional standard applicable to the admission of out-of-court declarations of nontestifying co-conspirators, but he is incorrect in suggesting that this is an appropriate case in which to resolve the split. Several circuits, including the First and Seventh Circuits, have held that a statement admissible under Fed. R. Evid. 801(d)(2)(E) *ipso facto* satisfies the requirements of the Confrontation Clause under *Dutton* v. *Evans*, *Ottomano* v. *United States*, *supra*; *United States* v. *Papia*, *supra*. The court below applied a rule more favorable to defendants in following *United States* v. *Snow*, 521 F. 2d 730, 734-735 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976), which applies the *Dutton* tests to statements admissible under the federal co-conspirator's exception. Contrary to petitioner's contentions (Pet. 10), the Second, Fifth, and Tenth Circuits have applied the same reliability standards, derived from *Dutton*, as the Ninth Circuit. See, *e.g.*, *United States* v. *Roberts*, 583 F. 2d 1173, 1175-1176 (10th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); *United States* v. *Puco*, 476 F. 2d 1099, 1104 (2d Cir.), cert. denied, 414 U.S. 844 (1973); *Hoover* v. *Beto*, 467 F. 2d 516, 533 (5th Cir.), cert. denied, 409 U.S. 1086 (1972).[9]

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[9]In *United States* v. *Johnson*, 575 F. 2d 1347 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979), a case decided after *Hoover* v. *Beto*, *supra*, on which petitioner seeks to rely, the Fifth Circuit appears to have adopted a flat rule that testimony admissible under Fed. R. Evid. 801(d)(2)(E) does not violate the Confrontation Clause.

Because petitioner obviously could not benefit from application to his case of the rule followed by the First and Seventh Circuits, there is no occasion here for the Court to review the question on which the circuits are divided.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

ROBERT E. LINDSAY
DONALD B. SUSSWEIN
Attorneys

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